conceded that this purpose is to cause the employer, who is able to transfer the burden to the consumer,[13] to give a prompt and certain pecuniary relief to the workman who has been injured in his employment.[14] Though to allow the employer to recover from one employee for the negligent injury to another for which the act has forced the employer to pay compensation, would undeniably be to place upon the employee the burden of an industrial injury, the acts do not contemplate giving the employee any other relief than compensation for industrial casualties. *A fortiori*, a negligent stranger is not given any protection by the act.[15] That many of the recent statutes have expressly given to the employer, to the extent of the compensation paid, a right of recovery over against the tortfeasor, yet, with but three exceptions, have not distinguished the negligent servant from the stranger, strengthens these conclusions.[16] However, it is more consistent economically to cause the industry as a part of the cost of production not only to supply relief to the incapacitated servant, but to assume the burden of all industrial injury of its employees. Hence, as legislation, statutes which forbid recovery by the employer against his negligent employee are preferable. Still the right of the master to recover on the principles of tort liability is not denied by the present statutes.[17]

TAXPAYER'S SUIT TO ENJOIN ELECTIONS ALLEGED NOT TO BE LEGALLY AUTHORIZED. — When a public official purporting to perform the duties of his office commits an illegal act, not only may the state call him to account by the exercise of the so-called prerogative writs,[1] but equity, at the suit of any person injured by the wrongful proceedings, will enjoin the violation of the plaintiff's rights.[2] The authorities are in confusion,

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[13] 2 TAUSSIG, PRINCIPLES OF ECONOMICS, 326.

[14] See Professor Wambaugh, "Workmen's Compensation Act," 25 HARV. L. REV. 129, 132.

[15] This problem is dealt with at length by Jeremiah Smith in his article on "Sequel to Workmen's Compensation Acts," *supra*.

[16] Recovery over to the extent of the compensation paid is granted the employer without qualification in the following statutes: CAL. L. 1913, ch. 176; CONN. L. 1913, ch. 138; ILL. BILL 841, 1913; IOWA L. 1913, ch. 147; KAN. L. 1911, ch. 218; NEB. L. 1913, ch. 198; NEV. L. 1913, ch. 198; N. J. L. 1913, ch. 95; R. I. L. 1912, ch. 831; WIS. L. 1911, ch. 50; 60 & 61 Vict., c. 37, § 6. In New York, the right of subrogation is limited to cases where the tortfeasor was not in the same employ. L. 1913, ch. 81; CONSOLIDATED LAWS, ch. 67. In Oregon and Washington the right of recovery over is limited to accidents away from the employer's plant. ORE. L. 1913, ch. 112; WASH. L. 1911, ch. 74.

[17] The opinion in the principal case describes the compensation paid the employee as past wages, and therefore not subject to recovery. This, it is submitted, overlooks the fact that the obligation is contingent, be the compensation in the nature of wages or otherwise, and therefore the liability thrust upon the employer is a damage which he would not otherwise have suffered.

[1] For a learned discussion of the relation of injunction to the legal prerogative writs, see State *v.* Lord, 28 Ore. 498, 510, 43 Pac. 471, 474. When the plaintiff has the alternative to apply for mandamus, he may be denied equitable relief. Larcom *v.* Olin, 160 Mass. 102, 35 N. E. 113.

[2] Crampton *v.* Zabriskie, 101 U. S. 601; Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 738; Board of Liquidation *v.* McComb, 92 U. S. 531.

however, as to the extent of the latter jurisdiction in such cases and the theory upon which the right to relief is based. Particularly conflicting are the decisions upon the right of a taxpayer to enjoin unauthorized acts by a state official which involve the expenditure of public funds and thereby affect the burden of taxation borne by the plaintiff. In a recent New York case a taxpayer was refused an injunction to restrain state election officials from proceeding with an election of delegates to a constitutional convention which was alleged not to be legally authorized. *Schieffelin* v. *Komfort*, 212 N. Y. 520.[3]

In suits of this nature the jurisdiction of equity rests not upon the defendant's breach of a "public trust," although this is sometimes stated,[4] for of course it is not the sort of a technical trust the existence of which gives equity jurisdiction. It rests instead upon the invasion of the plaintiff's right of substance, or, as it is commonly expressed, a property right. This is well shown by the fact that although there may be a breach of public duty, no injunction will be granted if the taxpayer can show no pecuniary damage.[5] And as the courts cannot enjoin the state, either as such or as represented in its executive officers,[6] relief must be denied where the injury to the plaintiff is being caused by officers acting under valid authority but in abuse of the discretion given them.[7] If, however, the act complained of is plainly unauthorized by law, as where it is the execution of an unconstitutional statute, the official in committing it does not represent the state and is as much subject to the decree of the court as a private person. In the principal case, illegality of both kinds was alleged: in counting the ballots cast for and against holding the convention, and in having held the first election under an unconstitutional statute. Equity could not take jurisdiction upon the first ground, not only because it was a matter of official discretion, but also because the court was bound to follow the facts as to the number of votes cast which had been determined by the executive department. But on the latter ground equity had jurisdiction.

Although jurisdiction exists, before granting injunctive relief, the court should balance any possible public harm its decree might cause against the injury done the plaintiff. It is obvious that there are cogent

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[3] See, for a full statement of this case, this issue of the REVIEW, page 327.

[4] See City of Chicago *v.* Collins, 175 Ill. 445. This was also stated to be the ground of the jurisdiction in 26 HARV. L. REV. 455.

[5] Against state officials: State *v.* Pennoyer, 26 Ore. 205, 37 Pac. 906; 28 Ore. 498, 43 Pac. 471; Sherman *v.* Bellows, 24 Ore. 553, 34 Pac. 549; Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683; Whitbeck *v.* Hooker, 133 N. Y. Supp. 534; State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35; and see Slack *v.* Jacob, 8 W. Va. 612; Frost *v.* Thomas, 26 Colo. 222, 56 Pac. 899. Against county or municipal officers: *Ex parte* Lumsden, 41 S. C. 553, 19 S. E. 749; Morgan *v.* Wetzel County Court, 53 W. Va. 372, 44 S. E. 182; Jones *v.* Black, 48 Ala. 540; Fletcher *v.* Tuttle, *supra*; *In re* Reynolds, 202 N. Y. 430, 96 N. E. 87.

[6] See the authorities digested in a note to Louisville & N. R. Co. *v.* Burr, 63 Fla. 491, 58 So. 543, in 44 L. R. A. N. S. 189.

[7] See Hutchinson *v.* Skinner, 49 N. Y. Supp. 360; Long *v.* Johnson, 127 N. Y. Supp. 756; Duncan *v.* Heyward, 74 S. C. 560, 54 S. E. 760. It will not do, however, to say that only ministerial acts may be enjoined. Granted that the statute is unconstitutional, the amount of discretion purported to be given by the void act is immaterial. But see Noble *v.* Union R. L. R. Co., 147 U. S. 165, 172, following Mr. Justice Bradley, in Board of Liquidation *v.* McComb, *supra*, 541.

arguments of policy against subjecting state officials to suits of this character. The public interest against allowing the hands of officials to be tied by constant litigation is so overwhelming that the few cents loss any taxpayer may suffer sinks into insignificance. It is submitted that this is the real justification for the decisions which, as the apparent weight of authority, sustain the New York case, but which go on the ground that no jurisdiction exists to enjoin state officers, rather than that objections exist as to its exercise.[8] Yet in this particular instance the gravity of the issue of the legality of holding the constitutional convention, and the expense involved, make it a close case from the point of view of the balance of convenience. The court supports its conclusion by the inference that since the legislature has expressly authorized taxpayers' suits against county and municipal officers, it has thereby denied them against state officials.[9] The argument is probably sound as to New York, for the courts there had previously refused injunctions against even local officers;[10] but in most jurisdictions such a statute would be merely declaratory, for taxpayers are generally allowed to enjoin city and county officials.[11] In view of the lesser public interest in their case, the result seems proper upon the balance of convenience. Moreover, unless they are acting in a strictly governmental capacity, under authority delegated to the municipality from the sovereign, the courts do not proceed upon the erroneous impression that they are being asked in effect to enjoin the state. The injunction therefore lies as readily as where a stockholder of a private corporation restrains mismanagement.[12] The principal case, although perhaps correct on the

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[8] Taxpayers were denied injunctions against the following acts involving the financial interest of the state: Borrowing money, Thompson *v.* Commissioners of Canal Fund, 2 Abb. Pr. (N. Y.) 248. Leasing public lands, Taylor *v.* Montreal Harbor Commissioners, 17 Rap. Jud. Que. C. S. 275. Election proceedings, People *v.* Mills, 30 Colo. 262. General maladministration, Jones *v.* Reed, 3 Wash. 57, 27 Pac. 1067. In the following similar cases the decision was rested in part upon the inability of the plaintiff to maintain the action: Enforcing income tax law, State *v.* Frear, 148 Wis. 456, 134 N. W. 673. Election proceedings, State *v.* Thorson, 9 S. D. 149, 68 N. W. 202. Leasing public lands, Tacoma *v.* Bridges, 25 Wash. 221, 65 Pac. 186. Opening schools, Hutchinson *v.* Skinner, *supra*. Maintaining grain inspection bureau, Birmingham *v.* Cheetham, 19 Wash. 657, 54 Pac. 37. General maladministration, Long *v.* Johnson, *supra*; Novarro *v.* Post, 5 Porto Rico Fed. 61. See also Duncan *v.* Heyward, 74 S. C. 560, 54 S. E. 760; 78 S. C. 227, 58 S. E. 1095; Edwards *v.* Lesueur, 132 Mo. 410, 33 S. W. 1130. But under similar circumstances injunctions were granted against the following acts: Election proceedings, Crawford *v.* Gilchrist, 64 Fla. 41, 59 So. 963; Livermore *v.* Waite, 102 Cal. 113, 36 Pac. 424. Selling state property, Mott *v.* Pa. R. Co., 30 Pa. St. 9. Operating a canal, Burke *v.* Snively, 208 Ill. 328, 70 N. E. 327. Receiving scrip for taxes, Auditor *v.* Treasurer, 4 S. C. 311. Paying expenses of public building, Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374.

[9] NEW YORK CODE OF CIVIL PROCEDURE, § 1925; GENERAL MUNICIPAL LAW, § 51.

[10] Roosevelt *v.* Draper, 23 N. Y. 318.

[11] Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359; Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314; Peck *v.* Spencer, 26 Fla. 23, 7 So. 642; Crampton *v.* Zabriskie, *supra*; White *v.* County Commissioners, 13 Ore. 317; Lanire *v.* Padgett, 18 Fla. 842. But see Pierce *v.* Smith, 48 Kan. 331, 29 Pac. 565.

[12] See POMEROY, EQUITABLE REMEDIES, § 326; DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1580. An additional reason that may be suggested for the distinction between suits against state officers and local ones is the possibility that the former may be sued by different taxpayers in several counties at once, with the resulting expense of defending a number of suits at the same time.

balance of convenience, does not go on that ground, but leaves the unfortunate impression that there is a jurisdictional objection against enjoining state officials in any case.

ALIEN ENEMIES IN THE COURTS OF A BELLIGERENT. — The European war, coming as it does after a prolonged period of free commercial intercourse between the great powers, has developed acutely the problem of what status shall be given in the courts to an alien enemy who is allowed to remain in a belligerent country after the outbreak of hostilities. A Canadian court has recently held that such an individual may recover in tort for a personal injury. *Topay* v. *Crow's Nest Pass Coal Co.*, 29 West. L. R. 555 (B. C.). An English court has refused to stop proceedings against a German insurance company. *Robinson & Co.* v. *Continental Ins. Co.*, 31 T. L. R. 20 (K. B. Div.).

War necessarily contorts the normal legal situation. Broadly speaking, all intercourse between citizens of the belligerent nations must cease. In the courts there will of course be no remedy whatsoever for the damage incurred by acts of hostility,[1] and for obligations that were entered into before the war and that mature either before or during it all remedies in favor of non-resident aliens must be suspended until peaceful relations have been restored.[2] But if an overstatement be made of the general principle,[3] attention may be diverted from certain important distinctions. It seems clear, for example, that belligerency ought not to alter the situation of an alien defendant, and operate in his favor by suspending the remedy against him. If he is within the jurisdiction and subject to personal service it would be odd reasoning that placed him on a better footing than a loyal citizen.[4] And this principle carried to its logical conclusion leads to the result that if the alien enemy is non-resident he is subject to all the usual remedies that are available against a non-resident defendant.[5] On principle it would seem that in this latter case the court ought to make sure of its being physically possible for the defendant to appear by attorney or in person, and to produce his evidence, and also that the proceeding ought to constitute an implied license for him to enter the jurisdiction if he chose to appear in person.[6] Otherwise the judgment would be purely confiscatory in effect, a policy which should be pursued, if at all, only by the executive. To refuse him the immediate payment of costs if he wins would also seem unjustifiable, and not answered by the suggestion that such a policy would furnish resources to the enemy, for by hypothesis an equivalent loss has already been inflicted.[7] All the customary defenses

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[1] Juando *v.* Taylor, 13 Fed. Cas., No. 7558.

[2] See 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 44–52. See also Driefontein, etc. Co. *v.* Janson, [1900] 2 Q. B. 339, 346; affirmed, [1902] A. C. 484.

[3] Such an overstatement was made by Lord Davey in Janson *v.* Driefontein, etc. Co., *supra*, [1902] A. C. 484, 499, and caused the court not a little difficulty in the recent English case.

[4] McVeigh *v.* United States, 11 Wall. (U. S.) 259, 267.

[5] Dorsey *v.* Kyle, 30 Md. 512.

[6] There is a suggestion favorable to this view in the recent English case at p. 21.

[7] See the recent English case where the query was raised at p. 22.